APPEAL NO. 020999
FILED MAY 22, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 28, 2002. With regard to the only issue before her, the hearing officer determined that the appellant's (claimant) compensable cervical, right shoulder, and lumbar back injury does not extend to and include a left shoulder rotator cuff tear, injury to the thoracic spine, and injury to the chest.

The claimant appealed, expressing his disagreement with the hearing officer's decision and citing information which he believes supports his position. The claimant also appeals the hearing officer's evidentiary rulings excluding some exhibits for lack of timely exchange and asks the Appeals Panel "to help him obtain an MRI . . . ." The respondent (carrier) responds, urging affirmance.

In addition to the claimant's appeal (which was sent by facsimile transmission (fax)), the Appeals Panel has received three additional faxes, which may have been intended to be part of the original appeal and which contain additional information. Those faxes were timely received as an appeal but none appear to have been served on the opposing party. *See* Section 410.202(a), which requires requests for appeal to be served "on the other party." As explained below, we decline to consider the additional information contained in those faxes, which is offered for the first time on appeal.

DECISION

Affirmed.

The faxes previously noted contain information submitted for the first time on appeal, including what appears to be additional unsworn testimony from the claimant; a report dated January 21, 2002, from Dr. O requesting Social Security disability benefits (which appears to be a copy of a report admitted as Claimant's Exhibit No. 6 in packet 2); an explanation of benefits dated March 20, 2002, from the carrier; other billing information dated "04/22/02"; and other medical records dated December 28, 2001, and January 30, 2002. The faxes were labeled "newly discovered evidence."

The Appeals Panel does not generally consider evidence that was not submitted at the CCH and which is raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993;

Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The medical records dated December 28, 2001, and January 30, 2002, were clearly in existence before the benefit review conference (BRC) on February 5, 2002, and the CCH. We cannot conclude that the claimant used diligence in attempting to bring that evidence to the attention of the hearing officer. Texas Workers' Compensation Commission Appeal No. 980299, decided April 2, 1998. Nor does the billing data, which was generated after the CCH, or explanation of benefits amount to newly discovered evidence which would probably produce a different result. Accordingly, we decline to consider the additional faxes or evidence attached thereto with the claimant's appeal in regard to the extent-of-injury issue.

On the merits, it is undisputed that the claimant was employed as a laborer for a masonry company and sustained a compensable injury on _____, while attempting to lift a 500-pound "stone" with the assistance of a coworker. The parties stipulated that the claimant sustained a compensable injury to his cervical spine (neck), right shoulder, and "lumbar back." The claimant initially saw Dr. T, who, in a report dated March 24, 2000, noted only cervical and lumbosacral complaints. Subsequent treatment included the right shoulder. In three Employee's Request to Change Treating Doctors (TWCC-53) forms, where the claimant changed treating doctors, only the low back, neck, and right shoulder were mentioned. The first mention of the newly claimed conditions is in a follow-up visit, office note dated February 27, 2001 (almost one year after the date of injury) by Dr. D, who states, "[the claimant] is also complaining of some pain in his sternum and upper back that started apparently with some of his therapy." We note that it is the claimant's contention that he sustained a specific injury to his chest and upper back on _____, and that no other complaints were noted at the time because the doctors were focused on his right shoulder, low back, and neck. The first mention of left shoulder complaints is in a report dated January 17, 2002 (some 22 months after the date of injury). That report notes that the claimant was referred to Dr. O on November 7, 2001, "with complaints of pain in both shoulders." Dr. O mentions the March 2000 "injury . . . to the right shoulder" and concludes that the claimant "is a manual laborer that works with repetitive motion of his shoulder to include overhead repetitive motion. There is no doubt that this is most likely related to his work." The claimant throughout has pursued a specific injury on _____, rather than either a repetitive trauma injury as indicated by Dr. O or an injury incurred during treatment as suggested by Dr. D.

The hearing officer commented:

> [T]he Claimant has failed to prove that he sustained an injury in the form of a rotator cuff tear to the left shoulder, and further, due to the extensive period of time between the date of injury and the first complaint, it is not likely that his left shoulder injury was sustained on _____. Thus, the Claimant has also failed to prove by a preponderance of the evidence that he sustained an injury in the form of a rotator cuff tear to his left shoulder or to his thoracic spine and/or chest.

The Appeals Panel has held that the question of the extent of injury is a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 011749, decided September 12, 2001. Our review of the evidence indicates that there are a number of reasons which support the hearing officer's determination that the claimant's compensable injury does not extend to the left shoulder, chest, and thoracic spine, one of which is the long delay between the date of injury and the claimant's initial complaints of the claimed injuries. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. The weight to be given to the claimant's testimony and the medical report was for the hearing officer to determine as finder of fact. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The claimant offered a number of exhibits to which the carrier objected as not having been exchanged. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) provides that no later than 15 days after the BRC, the parties shall exchange all documentary evidence, including medical reports and medical records. The claimant presented no good cause why the subject exhibits had not previously been exchanged. Rule 142.13(c)(3). We review the hearing officer's evidentiary rulings on an abuse-of-discretion standard. To obtain a reversal of a judgment based upon the hearing officer's abuse of discretion in admitting evidence, an appellant must first show that the exclusion was in fact an abuse of discretion, and, also, that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). The hearing officer did not abuse her discretion in excluding the claimant's exhibits on the basis that they had not been timely exchanged.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

Mr. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Roy L. Warren
Appeals Judge